(1) Supreme Court, U.S.
FILED
991410 FEB 22 2000

No.

In the

Supreme Court of the United States

FIRST MOUNT VERNON, I.L.A.,

Petitioner,

-versus-

PRINCE GEORGE'S COUNTY, MARYLAND, A Body Corporate and Politic,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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41 pp

QUESTIONS PRESENTED FOR REVIEW

There is disparity among the Circuit Courts as to the necessity of providing notice to legal owners of property prior to the property's condemnation and destruction by local officials. By not giving notice to an "owner of record" of property or a person or entity with a legal interest in the property, local officials devalue a person's or entity's interest in the property, diminish the purpose of public records, and violate the "owners" due process clause of the United States Constitution. The Petitioner relied upon public records that the transferor had a clean and marketable title prior to lending money to the latter; but, the County failed to file its alleged interest in the property in the public records, thereby dismissing the underlining purpose of public records and land court notice requirements. If the notice requirement is circumvented, then the overall impact is that lending institutions will tighten their money since they know that a piece of property can be devalued without them having the chance to rehabilitate or alienate its interest. Proper notice is an essential requirement for every act that infringes upon a person's interest in property. Other circuits agree with the Petitioner's position that the public land records office is the central station for notice involving properties.

I.WHETHER THE FOURTH CIRCUIT COURT OF APPEALS AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND ERRED IN DISMISSING THE PETITIONER'S CLAIM WHEN A VALID ISSUE AS TO THE NOTICE REQUIREMENT WAS VIOLATED BY LOCAL ZONING AND BUILDING OFFICIALS AND THEREBY VIOLATING THE DUE PROCESS REQUIREMENT OF THE UNITED STATES CONSITUTION?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit dated September 21, 1999 is reported in table format at 194 F. 3d 1304 and in full is unreported and set forth in the Appendix, p. 1a. The opinion of the United States District Court for the District of Maryland dated September 30, 1998 is set forth in the Appendix, p. 5a.

STATEMENT OF THE BASIS OF JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Fourth Circuit issued its Decision in this case on September 21, 1999. An order denying a petition for rehearing enbanc was entered on November 23, 1999. This Petition was timely filed within the appeal period.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny

to any person within its jurisdiction the equal protection of the laws.

RULES

Maryland Rule W74 a 2 (c) (iii) (1991):

Rule W74. Mortgages - Sale.

a. Preliminary Procedure.

. . .

2. Notice.

. . .

(c) By Certified Mail. Before making a sale of mortgaged property, the person authorized to make the sale shall also send notice of the time, place, and terms of sale by certified mail to the last known address of

. . .

(iii) The holder of a recorded subordinate mortgage or other recorded subordinate interest in the mortgaged property if, at least 30 days prior to the date of first publication of notice of a foreclosure sale which is actually held, the subordinate holder has recorded in the land records office of each county where the property is located a request for notice of sale. A

request for notice of sale shall identify the property in which the subordinate interest is held and shall state the name and address of the holder of the subordinate interest. It shall also identify the superior mortgage or deed of trust by stating the names of the original parties to the superior mortgage or deed of trust and the date the superior mortgage or deed of trust was recorded and by setting forth the office, docket or book, and page where the superior mortgage or deed of trust is recorded. All requests for notice of sale shall be recorded in a separate docket or book which shall be indexed under the name of the original mortgagor, under the name of the holder of the superior mortgage or deed of trust, and under the book and page numbers where the superior mortgage or deed of trust is recorded.

The notice of the sale shall be sent not earlier than thirty days and not later than ten days before the date of sale. The person giving the notice shall file in the proceedings a return receipt or an affidavit that the provisions of this paragraph have

> been complied with. Where such filing is made before final ratification, failure of the mortgagor to receive the notice shall not invalidate the sale. A failure to comply with the notice requirements of section a 2 (c) (ii) and (iii) does not affect the validity of the sale under the mortgage or deed of trust, and a bona fide purchaser for value at the sale is under no duty to ascertain whether the notice was validly given.

STATEMENT OF THE CASE

On September 19, 1997, First Mount Vernon, I.L.A., the Petitioner-Appellant, (hereinafter referred to as the "Petitioner") filed a Complaint in the United States District Court for the District of Maryland after learning that its security interest in a loan had been extinguished after Prince George's County, Maryland, the Appellee, (hereinafter referred to as the "County"), demolished a home located at 4805 Nash Street, Chapel Oaks, Maryland without notice to the Petitioner. In the Complaint, the Petitioner alleged that the County violated the Petitioner's Fifth and Fourteenth Amendments under the United States Constitution; violated the Petitioner's civil rights under 42 U.S.C. Section 1983; violated Maryland Declaration of Rights Articles 24 and 19; and negligence. The relevant facts pertaining to the case are as follows:

On November 24, 1992, the County posted a condemnation notice on a residential structure located at 4805 Nash Street, Chapel Oaks, Maryland, hereinafter referred to as the "Property". On December 1, 1992, the County sent written notice to John and Minnie Watson, the record owners of the property. When the Watsons failed to abate the conditions that led to the condemnation, the County instituted proceedings in the District Court of Maryland for Prince George's County in December, 1993 to obtain an order allowing demolition of the structure. On May 11, 1994, the District Court entered a default order allowing the demolition.

Shortly, thereafter, John and Minnie Watson transferred their interest in the Property to Ray Watson who filed a motion to stay the demolition. For approximately the next two years, the court repeatedly extended an order staying the demolition. All proceedings with regards to the demolition were conducted in the District Court of Maryland and no Orders, Notices or filings were filed in the Land Records or at the Circuit Court for Prince George's County.

In an effort to rehabilitate the Property and stave off demolition, on December 22, 1994, Ray Watson obtained a construction loan from the Petitioner, which loan was secured by a deed of trust on the Property. Prior to the loan closing, the Petitioner obtained a title search, which revealed **no** reference to any nuisance or demolition order, since no notices were filed among the Land Records for Prince George's County. After the closing, the Deed of Trust was promptly recorded among the Land Records.

After Ray Watson failed to appear at the District Court on March 20, 1996, the court issued on May 8, 1996, an Order allowing the demolition to proceed – ***two years***

after the Petitioner's security interest became effective as evidenced by the public land records. On August 26, 1996, the District Court denied Ray Watson's motion to stay and on August 30, 1996, the County demolished the structure. The County also filed a lien against the Property for their cost to demolish it. No notice of these proceedings or Orders was ever provided to the Petitioner.

On October 25, 1996, the Petitioner conducted a foreclosure sale after providing notice to all parties pursuant to the Due Process requirements mandated by the United States Constitution and case law. It was not until this time that the Petitioner discovered that the house on the Property was demolished and the security for its loan abated. The demolition of the house reduced Petitioner security value from $70,000.00 to less than zero after taking into account the demolition lien. The foreclosure sale was ratified by the Circuit Court for Prince George's County, Maryland on May 12, 1997.

As a result, the Petitioner filed a Complaint in the United States District Court for the District of Maryland against the County. On November 4, 1997, the County filed a Motion to Dismiss, pursuant to Rule 12 of the Federal Rules of Procedure, stating:

> that Plaintiff has failed to join a necessary party. Second there is no Due Process violation as the County gave proper and adequate notice in compliance with the provisions of the Prince George's County Code. Third, there is no constitutional taking as the County was acting pursuant to its police powers. Additionally, even if the County was not acting pursuant to its police powers,

> Plaintiff has not established that the actions of the County have deprived Plaintiff of all beneficial use of the property. Fourth the County did not breach a duty to Plaintiff and thus there is no viable negligence claim.

On September 25, 1998, the Honorable Deborah K. Chasanow entered her Order granting the County's Motion pursuant to Fed. R. Civ. P. 12(b)(6) solely based on the sufficiency of the due process argument, dismissing Petitioner's case.

As a result, the Petitioner filed an appeal to the Fourth Circuit Court of Appeals. On September 21, 1999, the Fourth Circuit affirmed the District Court's decision stating that the Petitioner was due no notice regarding the condemnation of the property that it had a legal interest in. This decision is contra to other circuit court opinions. As a result, the Petitioner has filed this writ for certiorari.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT COURT OF APPEALS AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND ERRED IN DISMISSING THE PETITIONER'S CLAIM WHEN A VALID ISSUE AS TO THE NOTICE REQUIREMENT WAS VIOLATED BY LOCAL ZONING AND BUILDING OFFICIALS AND THEREBY VIOLATING THE DUE PROCESS REQUIREMENT OF THE UNITED STATES CONSITUTION

Record owners of property are vested with property interests entitled to the procedural safeguards of due process.

Failure to provide those owners with adequate notice and an opportunity to be heard renders the statutory scheme unconstitutional. Conducting a title search is a reasonable first step to identify people with currents interests in real property. The important word is "reasonable". There is no reason why the County did not give the Petitioner actual notice. As outlined in this brief, the County did not act reasonably since they did not take minimum action in verifying who had interests in the Property prior to the demolition. Instead, the County relied on three-year-old facts, knowing that the owner of the property was seeking a mortgage to rehabilitate the property and knowing that in more than two years interests can change. The County did not use any reasonable method to notify interested parties of the condemnation, an act that is de facto unconstitutional. Therefore, the Petitioner's claim should have never been dismissed.

A Motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) ought not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v Gibson*, 355 U.S. 41, 4-46 (1957). In doing, the Court accepts all well-pled allegations of the complaint as true and construes the facts and reasonable inferences derived there from in the light most favorable to the plaintiff. *Inbarra v. United States*, 120 F.3d 472, 473 (4th Cir. 1997). The Court must disregard the contrary allegations of the opposing party. *A.S. Abell Co. v. Chell*, 412 F.2d 712, 715 (4th Cir. 1969). The Court, however, need not accept unsupported legal allegations, *Revene v. Charles County Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989), or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979).

As proven in this brief, there is clear and convincing evidence that the Petitioner's due process rights were violated since they had a legal interest in the property that was duly recorded in the public records more than two years prior to the demolition. Since the Petitioner relied upon public records prior to lending any money and affecting the owner's interest in the property, the County should have reviewed public records prior to demolishing a property since they were aware that the owner was seeking a loan.

The Circuit Court's decision erroneously found that the Petitioner was due no process regarding the condemnation of the Property in which it had acquired a security interest subsequent to the institution of the condemnation proceedings, on the ground that "the County conducting the condemnation had no duty to keep parties apprised who may have acquired an interest in the property after the initiation of the proceedings, but before the actual demolition of the subject property."[1] It has long been held that under the federal constitution, property may not be taken for public use without reasonable notice of the proceedings authorized for its taking, and without reasonable opportunity to be heard as to substantial matters of right affected by the taking. *North Laramie Land Company v. Hoffman*, 268 U.S. 276, 45 S.Ct. 491 (1925). The Petitioner was given no notice and its rights and interests in the property were substantially affected by the notice violation.

The Due Process Clause of the Fourteenth Amendment requires that a State prior to taking an action

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[1] Some courts are sensitive to due process requirements to the degree that they have found technical compliance with the statutory notice requirements of the jurisdiction insufficient on constitutional grounds. *See Right of Interest Party Receiving Due Notice of Tax Sale*: 45 A.L.R. 4th 447 (2000).

affecting an interest in property, provide notice that is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of that action. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); *Supreme Court's Construction of Due Process:* 77 L.Ed.2d. 1485 (1999). In *Mullane*, the Supreme Court stated that the fundamental right protected by the due process clause is the right to adequate notice and an opportunity to be heard before any state action depriving one of life, liberty or property is accorded finality. Adequate notice ensures the opportunity to be heard. Thus, *Mullane* established that state action affecting property must generally be accompanied by notification of that action. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 1344 (1988).

The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the County and the lower courts misapplied those basic constitutional concepts. This right to be heard has little reality or worth unless a citizen is required to be informed that a matter is pending which could affect him or his property, and that citizen can choose for himself whether to appear or default, acquiesce or contest. An elementary and fundamental requirement of due process in any proceeding to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But when notice is a person's due, process that

is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee, might reasonably adopt to accomplish it. *Mullane.* Invoking this elementary and fundamental requirement of due process, the *Mullane* court held that published notice was not sufficient, because it was not reasonably calculated to provide notice of the pending proceeding and therefore was inadequate to inform those who could be notified by more effective means such as personal service or mailed notice. It is a fundamental notion of due process that where the name and address of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely to apprise them of the pendency of an action that could eliminate those rights.

Prior to the loan closing, the Petitioner diligently conducted a full title and judgment search, which revealed no reference to any nuisance or demolition order. After closing, the Petitioner's Deed of Trust was promptly recorded among the land records for the County. The Petitioner's identity, address and interest in the Property were readily ascertainable from a cursory review of the land records for over a year and a half prior to the demolition.

As to the type of notice due, the Supreme Court, in cases since *Mullane*, has attempted to balance the interest of the State and the individual interest sought to be protected by the Fourteenth Amendment. *Tulsa*, 108 S.Ct. at 1344. However, it has adhered unwaveringly to the principles announce in *Mullane.* In *Walker v. City of Hutchinson*, 352 U.S. 112, 77 S. Ct. 200, 1 L.Ed. 2d 178 (1956), for example, the Court held that published notice was an inadequate means of informing a landowner whose name was on official records. Similarly, in *Schroeder v. New York City*, 371 U.S. 208, 83 S. Ct. 279, 9 L.Ed.2d 255 (1962), the Supreme Court

concluded that publication in a newspaper and posted notices were inadequate to apprise a property owner whose name and address were readily ascertainable from deed records. In *Green v. Lindsey*, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982), the Court held that posting a summons on the door of an apartment was inadequate means of providing notice. In *Mennonite, supra,* the Court again held that notice by posting, publishing and mail to the property owner was inadequate notice to a mortgagee of the property. The Court stated that an owner of property subject to deprivation by state action is entitled to means as certain as mail to ensure actual notice if his name and address are reasonably ascertainable through the exercise of reasonably diligent efforts. The Court stated that unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane.*

Actual notice must be sent to mortgagees and others interested parties in order to protect each interest holder's due process rights. Any form short of actual notice could cause constitutional issues since it may be unreasonable given the circumstances For most of this century, courts, like the lower courts herein, have taken the position that it is the responsibility of the interested party to keep himself informed. The Threat of Notice by Publication, 21 Ohio N.U.L. Rev. 107 (1994). However, what the lower courts in the case *sub judice* failed to do is to recognize the fact that the Petitioner did take reasonable steps to keep itself informed – it performed a title search, which showed no County interest that was prior to the Petitioner's. The County should not be exempt from performing a simple title search and confirming interested parties, just prior to ultimately effectuating a condemnation proceeding by way of demolition, especially when it performed its title search more than two years earlier.

In *Island Financial v. Ballman*, 607 A.2d 706 (1992) the Court of Special Appeals of Maryland held that where a Maryland Statute held that no notice was required of a senior lien-holder's foreclosure unless the junior lien-holder requested such notice, that the resulting foreclosure was void since it deprived the junior lien-holder its due process rights to notice. The focus is on the reasonableness of the balance, and as *Mullane* itself made clear, whether a particular method of notice is reasonable depends on the particular circumstances. *Id.* 108 S.Ct. at 1344.

The United States District Court and the Circuit Court of Appeals' opinions overlooked the fact that the procedure followed by the County in obtaining and enforcing the demolition order on the Watsons' property failed to meet the standards delineated by the United States Supreme Court in *Mullane* and the Court of Special Appeals of Maryland's standards in *Island Financial*. Judge Chasanow's opinion affirmed on appeal justifies the County's taking because the County provided notice to a former homeowner two and half years before the loan was obtained and his interest became set. However, property interests can change over a long period of time. The record is uncontroverted that the Petitioner received no notice of any proceeding. The Petitioner was clearly a reasonably ascertainable interest holder since it recorded its Deed of Trust in the public records. If the county updated its title search or used any diligence in confirming who may have had an interest in the Property, then this matter would have been avoided. Moreover, the County agreed that "the facts are essentially undisputed," thus conceding that Petitioner was a reasonably ascertainable party with an interest in the subject property. Instead, the County argued that at the time that this written notice was required, Plaintiff did not have any legal interest

[in] the property. Thus it was not necessary to give [Petitioner] notice.... Therefore, the County provided the notice required under the Code. The County's Code is not designed to reasonably give due process to those persons who may have a security interest in real property to be condemned. Since the code lacks notice requirements to interest holders whose interests arise after the initial notice of condemnation but before the actual demolition, the code is per se unconstitutional.

These very issues were reviewed by the United States Court of Appeals for the Eighth Circuit in *Kornblum v. St. Louis, Missouri*, 72 F.3d 661 (1995). In *Kornblum*, the owner of a house that had been declared a public nuisance and razed by the county brought a Section 1983 action, alleging that he was deprived of his property without due process of law. On consideration en banc, the Court of Appeals held that the means resorted to, to give notice to the prospective purchasers, did not satisfy due process. This is exactly what Petitioner has argued -- the means resorted to by the County to provide notice to reasonably ascertainable persons three years before it took its action does not satisfy due process, and thus the lower courts erred in granting the County's Motion. The Petitioner must have been given actual notice since its interest was reasonably ascertainable and it must have been given the opportunity to be heard – then the County would have met its constitutional due process obligation.

In *Kornblum*, Mr. Kornblum conducted a title search that revealed no reference to any nuisance declaration or demolition orders of any kind, and could not have, since none had been filed or recorded. Similarly to this case, the County argued that Kornblum was not entitled to notice because his identity was not ascertainable at the time the County filed the

action. This was not accepted by the Court of Appeals for the 8th Circuit. *Id* at 662. The *Kornblum* court recognized that *Mullane* dealt with a complaint about not being afforded an opportunity to be heard, and that the Plaintiff, as in the instant action, complained of a failure to give notice that a certain property had been declared a nuisance by County building inspectors. However, the Court found that difference not to be constitutionally significant. *Id* at 663. The Court stated that the declaration itself was the beginning of an adjudicatory process that was likely to end (and did end) in the destruction of a building, and it is on that process as a whole that the Constitution makes demands of fairness.

The *Kornblum* court further stated that some form of notice to future purchasers such as Mr. Kornblum was called for under the circumstances of that case. The Supreme Court has recognized that persons whose interests are either conjectural or future are entitled to some consideration when notice is provided. *See Mullane*, 339 U.S. at 317, 70 S.Ct. at 658-59. While the Court was evidently speaking there of present owners of vested and contingent future interests, there is no relevant constitutional differences between such persons and prospective purchasers in an active land market. The identity of the present owners of contingent future interest is frequently as unascertainable as the identity of subsequent buyers. And both classes of persons are likely to suffer loss in equal measures from a lack of notice.

Similarly to the instant action, the *Kornblum* court found that the delay in demolition contributed to the loss. It is clear that *Mennonite* and *Tulsa* support the principle that failure to notify a "reasonably ascertainable" property owner before taking any action that would deprive him of property violates the due process clause of the Fourteenth Amendment to the United States Constitution. In *Kornblum,* demolishing

the property contributed significantly to the unreasonableness of the notice to prospective purchasers. Likewise, in the instant case, the lack of notice prevented the Petitioner from taking whatever defensive measures may have been necessary, including refusing to issue the rehabilitation loan, or persuading the County to rescind its order, or delay its execution to allow completion of the repairs to the home. This delay contributed significantly to the unreasonableness of the notice in this case. A considerable time elapsed between the time that the County condemned the building and the time that it demolished it. The identity of the people who will want notice will frequently change over time. In *Kornblum*, the Court charged the County with knowing that the notice requirements **change over time**. The Court stated:

> Because the County delayed a long time before it demolished the building it created a foreseeable and appreciable risk that its action would affect a set of interested parties different from those who interests were affected when the house was declared a nuisance. For this reason, we disagree with the contention that whether a party is entitled to notice is fixed at the time the condemnation procedures commence, especially when the government delays its demolition for a substantial length of time.

Kornblum at p. 664.

The Kornblum court then concluded that the record on summary judgment forecloses a conclusion that the County acted to provide notice that was reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action. Unlike in the instant

action, Missouri law provided due process safeguards that mandated that condemnation proceedings be recorded among the Land Records. However, the County cannot escape due process requirements by arguing no such mandate is contained under Maryland law.

Moreover, Maryland foreclosure and tax sale statutes have all recognized the problems inherent with subsequent interest holders failing to obtain notice as a result of time delays. Section 7-105 of the Real Property Article of the Annotated Code requires the acting party to update his title review to include all reasonably ascertainable parties who acquire an interest within 30 days of the foreclosure sale. Similarly, § 14-836 of the Tax Property Act of the Annotated Code of Maryland provides a parallel 30-day requirement.

Several federal courts have already considered affirmative duties by the affected class and found it wanting on due process grounds. *Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883 (5th Cir. 1989). In *Small Engine*, the court was confronted by a due process challenge to a Louisiana statute providing, in part, that "any person desiring to be notified in the event specific immovable property is seized shall file a request for notice of seizure in the mortgage records of the parish where the immovable property is located." La. Rev. Stat. Ann. Section 13:3886 (1989). The Petitioner in *Small Engine* had assumed a first mortgage on a property and had not filed a request to be notified of seizure of the property in question. The Borrower apparently defaulted on the mortgage and, because Louisiana law required a lien holder to give actual notice only to the party with whom it had contractual privity, the Petitioner received no actual notice prior to a foreclosure sale. 878 F.2d at 884-86. In *Small Engine*, the United States District Court ruled against Petitioner's due process claim in a holding that, as

characterized by the Fifth Circuit panel, would allow the Louisiana statute to "eliminate the circumstantial nature of a due process inquiry by prospectively shifting the entire burden of ensuring actual notice, in every case, to the owner of property subject to deprivation." 878 F.2d at 886.

After reviewing the Supreme Court's holdings in *Mullane*, *Mennonite*, and *Tulsa*, discussed above, the Fifth Circuit opinion considered the various justifications that could be advanced for holding that Louisiana's request notice statute, as enforced against *Small Engine*, is consistent with the *Mennonite* requirement that the responsible state actor make "reasonably diligent" efforts to discover and give notice to any reasonably ascertainable property owner. *Small Engine*, 878 F.2d at 888, *citing Mennonite*, 103 S.Ct. at 2711. The court considered and rejected the argument that since Small Engine did not pay its obligation under the mortgage, it must be assumed to have known that it was risking foreclosure. *Small Engine*, 878 F.2d at 892. The court held that "*Mennonite's* dictates, . . . govern 'a proceeding which will adversely affect the liberty or property interests of ***any*** party.'" *Id.* quoting *Mennonite*, 103 S.Ct. at 2712. "Moreover, 'a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.'" *Id.* The *Small Engine* court thus held that irrespective of whether a property owner is sophisticated enough to know the laws affecting its property interest, or whether that property owner could have taken steps to safeguard its interest, *Mennonite's* "reasonable diligence" command to the responsible state actor cannot be ignored because to hold otherwise would give the request notice statute an unconstitutionally broad sweep. 878 F.2d at 892.

Critics of the actual notice requirement focus on the burden of the County. *See* John W. Fisher II, Forfeited and

Delinquent Lands-The Unresolved Constitutional Issue, 89 W. Va. L. Rev. 961 (1987); Jerry L. Malone, Property-Meeting the Due Process Requirements of Notice to Mortgagees in Tax Sales, 7 U.Ark. Little Rock L.J. 437 (1984). However, critics fail to recognize the small price of reviewing title compared to the violation of constitutional due process rights. As discussed above, *Kornblum* also shifted the burden of updating notice requirements to the party seeking to take property. In the instant case, the lower courts shifted the burden of notice to the Petitioner because they state that it is a "sophisticated mortgage lender" and because its interest arose after the initiation of the condemnation proceeding. However, the due process clause does not place the burden of the Petitioner – the burden remains with the state governing body. Being a sophisticated lender, the Petitioner performed a title search prior to its interest and saw no government proceeding on record. If the County does not have to record its interest and give public notice, then there is a material defect in the code and it is unconstitutional. If the Circuit Court's opinion is affirmed, then a governmental entity could swipe away a property from secured parties without providing adequate notice to the interest-holders. The County's notification procedure does not meet constitutional requirements since it does not meet the test of whether the code was reasonably calculated to apprise the Petitioner of the pendency of the condemnation proceedings.

Moreover, in *Island Financial v. Ballman*, 607 A.2d 76 (1992), the appellee espoused a similar argument. The Court of Special Appeals discerned the arguments and concluded that even where the statute required junior mortgage holders to request that they be notified of an impending foreclosure action which could extinguish their interest, the failure of the senior lien holder to provide notice to reasonably ascertainable interest holders violated the

United States Constitution requirements. As the appellants in *Island Financial* successfully argued, to impose the burden on the party taking the adverse action to conduct an updated title review for minimal cost is not unreasonable given the magnitude of the losses caused by the failure to do so.

Petitioner's deed of trust was a property interest protected by the Fourteenth Amendment. The Supreme Court of the United States has stated that "a mortgagee clearly has a legally protected property interest." *Mennonite, supra*. Moreover, the Supreme Court has held that even unsecured claims or interests as intangible as mere causes of action are property interests entitled to due process protection. *Tulsa, supra*. The County's demolition effectively extinguished Petitioner's interest in the subject property.

It is undisputed in this case, however, that Petitioner's name and address were reasonably ascertainable through reasonably diligent efforts. Thus, the demolition statute can be applied constitutionally in this case only if the County's interest in strictly enforcing the statutory provision outweighs Petitioner's interest in receiving actual notice prior to the deprivation of its property interest. While it could be argued that the demolition is reasonably related to a legitimate state objective, namely providing for a uniform and orderly method by which to notify interested lien holders and, thus, contributing to the overall efficiency and certainty of condemnation proceedings, this argument must fail, because "efficiency is not the standard-bearer of due process." *Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883, 892 (5th Cir. 1989). Moreover, the Supreme Court considered and rejected this very argument in an analogous situation in *Tulsa, supra*.

In *Tulsa*, the Court held that Oklahoma's legitimate interest in the expeditious resolution of probate proceedings did not outweigh a reasonably ascertainable unsecured creditor's due process right to actual rather than constructive notice of a deadline for filing a claim against a decedent's estate. *Tulsa*, 108 S.Ct. at 1347. In this context, the Court stated that "we have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice," 108 S.Ct. at 1348, and, for support, cited its holdings in *Bank of Marin v. England,* 385 U.S. 99, 87 S.Ct. 274 (1966) (requiring actual notice in bankruptcy proceedings), and *Mullane* at 318-19 (requiring actual notice in trust proceedings). Just as "probate proceedings are not so different in kind that a different result is required," *Tulsa,* 108 S.Ct. at 1348, foreclosure proceedings are not so different from any of the proceedings listed above that Maryland's interest in orderly and efficient condemnation proceedings can be said to outweigh Petitioner's due process right to notice and an opportunity to be heard before being deprived of property.

The Petitioner requested that the Fourth Circuit Court follow the decisions and the analytical framework of the United States Supreme Court and of the 5th and 8th Circuits; and, more importantly, follow the due process notification requirement as established in *Mullane, Mennonite* and *Tulsa.* These well reasoned decisions makes clear that a state, or a responsible state actor, cannot deprive any reasonably ascertainable person of property without first notifying that person, at least by mail, so that he has an opportunity to be heard. The due process clause places the notice burden on the state or the responsible state actor, and the County demolition procedure cannot constitutionally shift that burden to a property owner whose name and address are reasonably ascertainable through the exercise of reasonable diligence.

Petitioner merely asks this Court to recognize the Supreme Court decision in Mennonite which case has established the standard to be applied in cases where a person is deprived of property without notice. Actual notice was the only proper notice under the facts in the instant case. Although the exact facts of this case were not before the Supreme Court in *Mennonite* or in *Tulsa,* nevertheless, the general factual outline of this case, that is, a person deprived of property without notice, was present in both cases, and the result was the same in both cases: the Court required actual notice or its equivalent to reasonably ascertainable persons prior to the deprivation of their property interests. The Eighth Circuit's decision in *Kornblum* thoroughly explores the issues involved in this case and its well-reasoned opinion could and should be applied to the facts herein. This case is ripe for the Court to extend and clarify the requirement of actual notice to a secured interest holder, whose interest attached after the initial non-published proceeding, but before the actual demolition.

The County's lack of a reasonably calculated notice procedure caused a violation of the Petitioner's due process rights. As stated above, a determination of what constitutes valid notice, and what steps are reasonable under the circumstances, is in conflict among the circuits. The Petitioner had a legally protected property interest, and, thus, it was entitled to notice of the condemnation procedure, and more importantly, the pending demolition, since its interest was reasonably calculable. This Honorable Court must commit to a formula to achieve uniformity among the jurisdictions as to reasonable notice.

CONCLUSION

The Fourth Circuit and the District Court of Maryland have placed a high burden of proof upon the Petitioner to overcome a motion to dismiss in a due process case. The Court should grant *certiorari* to review this important matter, clarify the parties burden, determine that the County's condemnation procedure failed to provide constitutionally required notice of the demolition, thereby violating the Petitioner's due process rights, order a proper remedy for the Petitioner, and reverse the lower court's opinion.

Respectfully submitted,
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(Any footnotes trail end of each document)
No. 98-2601

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FIRST MOUNT VERNON, I.L.A.,
Plaintiff - Appellant,

versus

PRINCE GEORGE'S COUNTY, MARYLAND, A Body Corporate and Politic,
Defendant - Appellee.

9/21/99

COUNSEL:
Ronald S. Deutsch, Stephen N. Goldberg, COHN, GOLDBERG & DEUTSCH, L.L.C., Towson, Maryland, for Appellant.

Sean D. Wallace, Acting County Attorney, Rhonda L. Weaver, Associate County Attorney, Upper Marlboro, Maryland, for Appellee.

JUDGES:
Before WILLIAMS and MICHAEL, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

OPINION:

PER CURIAM:

First Mount Vernon, I.L.A., appeals from the district court's order granting Prince George's County's motion to dismiss and dismissing its complaint in which it alleged that

the County violated its due process rights by failing to provide notice to it prior to the demolition of property in which First Mount Vernon had acquired an interest. Because we find that Prince George's County provided adequate notice of the proceeding at the time of the commencement of the proceeding and that further additional notice to persons acquiring an interest after the commencement of the proceedings was not required here, where Prince George's County was not aware of First Mount Vernon's interest, we affirm on the reasoning of the district court. See First Mount Vernon, I.L.A. v. Prince George's County, Maryland, No. CA-97-3190-DKC (D. Md. Oct. 2, 1998); * see also *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317, 94 L. Ed. 865, 70 S. Ct. 652 (1950)* (finding notice by publication sufficient for those whose interests are contingent, future, or not likely to come to trustee's attention in normal course of business). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

----------Footnotes----------

* Although the district court's order was signed on September 28, 1998, the district court's records show that it was entered on the docket sheet on October 2, 1998. Pursuant to Rules 58 and 79(a) of the Federal Rules of Civil Procedure, it is the date that the judgment or order was entered on the docket sheet that we take as the effective date of the district court's decision. See *Wilson v. Murray, 806 F.2d 1232, 1234-35 (4th Cir. 1986).*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FIRST MOUNT VERNON, I.L.A.,
Plaintiff,

versus

PRINCE GEORGE'S COUNTY, MARYLAND, A Body Corporate and Politic,
Defendant.

9/30/98

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is this 28th day of September, 1998, by the United States District Court for the District of Maryland, ORDERED that:

1. The motion of Defendant Prince George's County, Maryland to dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b) (6) BE, and the same hereby IS, GRANTED;

2. The motion of Defendant Prince George's County, Maryland to dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b) (7) BE, and the same hereby IS, DENIED as moot;

3. Plaintiff's Complaint BE, and the same hereby IS, DISMISSED; and

4. The clerk mail copies of this Order and the Memorandum Opinion to counsel for the parties and CLOSE this case.

DEBORAH K. CH SANOW

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FIRST MOUNT VERNON, I.L.A.,
Plaintiff,

versus

PRINCE GEORGE'S COUNTY, MARYLAND, A Body
Corporate and Politic,
Defendant.

9/30/98

MEMORANDUM OPINION

Presently pending and ready for resolution is the motion of Defendant Prince George's County, Maryland ("the County") to dismiss the complaint of First Mount Vernon, I.L.A. ("Mount Vernon") pursuant to Fed. R. Civ. P. 12(b) (6) & 12(b) (7). The issues have been fully briefed, no hearing is deemed necessary, and the court now rules pursuant to Local Rule 105.6.[1]

Rule 12(b) (6) Standard

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (6) ought not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45—46 (1957) . In so doing, the Court accepts all well-pled allegations of the complaint as true and construes the facts end reasonable inferences derived therefrom in the light most favorable to the plaintiff. *Ibarra v. United States,* 120 F.3d 472, 473 (4th Cir. 1997). The Court must disregard

the contrary allegations of the opposing party. *A.S. Abell Co. v. Chell,* 412 F.2d 712, 715 (4th Cir. 1969). The Court, however, need not accept unsupported legal allegations, *Revene v. Charles County Comm'rs,* 882 F.2d 870, 873 (4th Cir. 1989), or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst,* 604 F.2d 844, 847 (4th Cir. 1979)

Background

There is little dispute regarding the facts in this matter. On November 24, 1992, the County posted a condemnation notice on a residential structure located at 4805 Nash Street, Chapel Oaks, Maryland (the "Nash Street property") . On December 1, 1992, the County sent written notice to John and Minnie Watson, the record owners of the Nash Street property. When the Watsons failed to abate the conditions that led to the condemnation, the County instituted proceedings in the District Court of Maryland for Prince George's County in December, 1993 to obtain an order allowing demolition of the structure. On May 11, 1994, the District Court entered a default order allowing the demolition.

Shortly thereafter, John and Minnie Watson transferred their interest in the property to Ray Watson. Ray Watson, in turn, filed a motion to stop the demolition. For approximately the next two years, the court repeatedly extended an order staying demolition. On December 22, 1994, Ray Watson obtained a loan from Mount Vernon secured by a deed of trust in the property which was promptly recorded. After Ray Watson failed to appear in District Court on March 20, 1996, the court issued a May 8, 1996, Order allowing demolition to proceed. On August 26, 1996, the

District Court denied Ray Watson's motion to stay and on August 30, 1996, the County demolished the structure.

Plaintiff's Complaint alleges that the County violated its due—process rights by failing to notify it before depriving it of a property interest and by failing to provide compensation for the taking of that property. Mount Vernon also asserts parallel claims under the Maryland Declaration of Rights and a state law claim for negligence.

Analysis

I. Due Process Claim

Before the government may take any action which adversely affects a person's property rights, due process ordinarily requires that the property owner be given notice and an opportunity to be heard. *Tulsa Professional Collection Services v. Pope,* 485 U.S. 478, 484 (1988) . The notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) . Actual notice is required for any party whose name and address are reasonably ascertainable. *Mennonite Bd. of Missions v. Adams,* 462 U.S. 791, 800 (1983). Moreover, mortgagees such as Mount Vernon are typically within the scope the notice and hearing requirement. *Id.* at 798.

The County gave all the notice that was due. When it first posted the condemnation notice on the Nash Street property, the County notified the owners of record, John and Minnie Watson. At that time, Plaintiff had no interest in the property and was due no process. Plaintiff only acquired an

interest in the property after the County gave proper notice to the Watsons.

Plaintiff mistakenly contends that due process requires the County to record condemnation proceedings in the land records and to monitor ownership of condemned properties, notifying anyone who acquires an interest in such properties. The County has no such obligations. First, while condemnations are not noted in the land records, they are a matter of public record. The proceedings in the county district court regarding the Nash Street property were open to the public and were available to Plaintiff had it bothered to look. Second, Plaintiff is a commercially sophisticated mortgage lender that acquired an interest in a dilapidated property. Due diligence should have revealed the County's condemnation of the property. The burden is not on the County continually to find and notify new owners of condemned properties. To the contrary, the burden is on careful purchasers to investigate the nature of the properties they are considering buying.

In contrast, if during the pendency of the condemnation proceedings the County had *actually* become aware of Mount Vernon's after-acquired security interest, it might have had an obligation to give Mount Vernon notice. Plaintiff, however, alleges no facts from which the Court can reasonably infer that the County actually knew of Plaintiff's interest in the Nash Street property. Plaintiff alleges that on one occasion the condemnation proceedings were continued to allow the record owner of the Nash Street property an opportunity to obtain financing to rehabilitate the structure. Plaintiff asks the Court to draw several layers of inference from this single allegation. First, that the record owner obtained financing. Second, that the financing was provided by Mount Vernon. Third, that the financing was secured by

an interest in the Nash Street property, as opposed to some other collateral. And finally, that the County was actually aware of Mount Vernon's security interest in the property. Moreover, Plaintiff asks the Court to draw this series of inference in the face of Plaintiff's tacit admission that, whether or not financing was ever obtained, the property was never rehabilitated. On this basis, it is simply not reasonable to impute to the County actual knowledge of Mount Vernon's interest.

II. Takings Claim

It is also clear that the County's destruction of the Nash Street property was not a "taking" that entitled Plaintiff to compensation. "[L]and-use regulation does not effect a taking if it substantially advance[s] legitimate state interests[.]" *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1024 (1992) When the state regulates land use, it need only compensate a property owner for any deprivation of his or her economic use of the land if the regulation "unfairly single{s] out the property owner to bear a burden that should be borne by the public as a whole." *Yee v. City of Escondido,* 503 U.S. 519, 522-23 (1992) (citing *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 123—25 (1978)) . The Court finds it sufficiently clear that the condemnation and destruction of dilapidated buildings bears a strong connection to the state's legitimate interest in protecting the public welfare. Residents of Prince George's County are required to maintain their property in a state that does not threaten the health or safety of the public. The Nash Street property was not so maintained, and the County was justified in tearing it down.

III. Negligence Claim

Plaintiff claims that the County had a duty not to violate its constitutional rights and negligently did so when it tore down the Nash Street property. The Court need not decide whether the County had any such duty because, for the reasons stated above, it finds that Plaintiff has stated no claims for constitutional violations, negligent or otherwise.

IV. State Law Claims

The Court also dismisses Plaintiff's state law claims because Plaintiff concedes that those claims are based on the same theories as Plaintiff's federal constitutional claims and that the United States Constitution and the Maryland Constitution are interpreted in the same way in this field.

Conclusion

For the foregoing reasons, Plaintiff's motion to dismiss is granted. A separate order will be issued.

DEBORAH K. CHASANOW
United States District Judge

Footnote

[1] As this matter can be resolved pursuant to Fed. R. Civ. P. 12(b) (6), the Court does not address the County's arguments regarding failure to join a necessary party

No. 98-2601

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FIRST MOUNT VERNON, I.L.A.,
Plaintiff - Appellant,

versus

PRINCE GEORGE'S COUNTY, MARYLAND, A Body
Corporate and Politic,
Defendant - Appellee.

Filed: November 23, 1999

On Petition for Rehearing En Banc

Appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court

s/ Patricia S. Connor
Clerk